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September 25, 2013

ALSO SENT VIA E-MAIL TO eac50@pitt.edu ON 9-25-13

Emily A. Collins, Supervising Attorney
University of Pittsburgh School of Law
Environmental Law Clinic
P.O. Box 7226
Pittsburgh, PA 15213-0221

Re: Waste Treatment Corporation
Notice of Intent to File a Citizen Suit letter dated July 18, 2013

Dear Emily:

I represent Waste Treatment Corporation ("WTC") with respect to the discharge of treated wastewater authorized by WTC's NPDES permit for its Warren facility ("Facility"). Your above-referenced Notice of Intent letter ("NOI Letter") was forwarded to me for a response.

Initially, I should note that on September 17, 2013, the Pennsylvania Department of Environmental Protection ("DEP") commenced an enforcement action in Commonwealth Court (Docket No. 463 MD 2013) to address the same alleged violations and subject matter raised your NOI Letter. I understand that Assistant Counsel Michael Braymer apprised you of the likelihood of such action on September 13, 2013. In light of this development, a citizen suit action under either the Federal Water Pollution Control Act (aka the Clean Water Act) and/or the Pennsylvania Clean Streams Law is barred. *See* 33 U.S.C. § 1365(b)(1)(B) and 35 P.S. § 691.601(e). That said, WTC recognizes that Clean Water Action ("CWA") has the right to intervene in the enforcement action and does not intend to object to such intervention if CWA elects to do so. In addition, WTC is amenable to meeting with CWA to discuss CWA's concerns.

With respect to the allegations raised in your NOI Letter, WTC responds as follows:

The gist of the NOI Letter is that WTC is violating specific effluent parameters in its NPDES permit, as well as a narrative provision of the permit concerning the control of pollutants. Further, CWA believes that WTC's discharge falls outside the scope of the permitted Centralized Waste Treatment ("CWT") Subcategory of "Metals Treatment and Recovery" (40 C.F.R. Part 437, Subpart A), and WTC's discharge of treated wastewater generated by the oil and gas industry is therefore unauthorized. In this regard, your Letter posits that DEP was either unaware of the oil and gas related characteristics of the wastewater being treated by WTC when it renewed WTC's NPDES permit in 2003, or was aware of such characteristics and prohibited

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WTC from treating such wastewater by placing the Facility in the Metals Subcategory. Various references in the Letter also suggest that WTC is discharging treated wastewater generated by development of unconventional (*e.g.*, Marcellus shale) wells. The Letter concludes by claiming that "WTC has been violating section 301(a) of the [Clean Water Act] since at least 2003 by accepting oil and gas wastewater that falls outside of the Subcategory A wastes that it was authorized to accept for treatment."

Contrary to your NOI Letter, DEP was fully aware of the fact that WTC was treating wastewater generated by the oil and gas industry when it renewed WTC's NPDES permit in 2003. At that time, DEP determined that WTC's permit should be governed by the federal CWT regulations, even though these regulations do not provide for a subcategory tailored to wastewater generated by the oil and gas industry. This presented a dilemma for DEP: it was obligated to select a subcategory that most closely resembles wastewater being treated by WTC knowing that none of the three primary subcategories (*i.e.*, Metals, Oils, and Organics) were intended to address the type of wastewater being treated at the Facility. Prior to the 2003 permit renewal, DEP and WTC's environmental consultant discussed this deficiency in the federal regulations and the problem of selecting a subcategory that knowingly does not reflect wastewater being treated at the Facility. During these discussions, WTC's consultant expressed the view that the Organics Subcategory (Part 437, Subpart C), although not intended for oil and gas wastewater, was the most appropriate choice of the three subcategories. After considering the matter, DEP disagreed and determined that wastewater being treated by WTC most closely resembled wastewater under the Metals Subcategory. Consequently, effluent limitations for the Metals Subcategory were included in WTC's 2003 NPDES permit. WTC questioned the wisdom of the DEP's decision at the time, but decided not to challenge the decision and instead focused on complying with the new effluent limitations.

Since 2003, the DEP – along with the U.S. Environmental Protection Agency ("EPA") – has come to believe that wastewater generated by the oil and gas industry more closely resembles wastewater under the Organics Subcategory. WTC understands that this change will be reflected in its renewed NPDES permit. One result will be the elimination of titanium and arsenic as permit parameters, so the permit violations for these effluent limitations will no longer occur once the permit is renewed. Obviously, had DEP selected the Organics Subcategory for the 2003 NPDES permit as recommended by WTC's consultant at the time, there would not have been recurring violations for these two parameters as outlined in your NOI Letter.

For what it is worth, DEP recently informed WTC that EPA is working on a new subpart for the CWT regulations to specifically address wastewater generated by the oil and gas industry. DEP also explained, however, that EPA is not very far along in the rulemaking process, and DEP intends to move forward with renewing WTC's NPDES permit under existent regulations.

As correctly noted in your NOI Letter, WTC submitted a renewal application for its NPDES permit in May 2008. The submission date was more than 180 days before the permit expiration date, so WTC's NPDES permit was administratively extended by operation of law. *See* 25 Pa. Code § 92a.7(b). As a result, and contrary to repeated misrepresentations in your NOI Letter, WTC is not operating under an "expired" permit. The 2003 NPDES permit remains valid and in effect.

It is unclear why DEP has not acted on WTC's NPDES permit renewal application, which has been a source of frustration for both WTC and CWA. WTC believes that the likely cause is DEP's and/or EPA's dissatisfaction with the draft permit, the parameters for which were based on the Organics Subcategory and Penntox modeling results, which would have authorized WTC to discharge a weekly average of 315,624 pounds per day of Total Dissolved Solids ("TDS"). As you know, DEP became increasingly concerned with water quality issues as a result of the Marcellus shale boom, which led to DEP's study of the Monongahela River and the effect of chlorides on public water supplies. As a result of that study and other information evaluated by DEP, DEP amended its Chapter 95 regulations in August 2010 by promulgating TDS discharge standards for new dischargers. In addition, in April 2011 then-Secretary Krancer announced that DEP was requesting all unconventional oil and gas developers to cease taking wastewater to processing facilities and sewage treatment plants, and in November 2011 DEP adopted Technical Guidance to address wastewater high in TDS. All of these developments occurred during the pendency of DEP's review of WTC's NPDES permit renewal application, and WTC suspects that the constantly changing landscape contributed to DEP's delay in acting on the application.

As your NOI Letter correctly noted, at the time WTC submitted its permit renewal application in 2008, it was accepting oil and gas wastewater generated by unconventional well development (specifically Marcellus shale development), which is more concentrated and poses a greater risk to the environment than wastewater from "shallow" oil and gas development. However, as a result of then-Secretary Krancer's announcement in April 2011, WTC ceased treating wastewater from unconventional development. Although the Facility accepts such wastewater, it is not processed for discharge, but is instead filtered and sent to underground injection wells in Columbus, PA (owned by Bear Lake Properties, LLC).

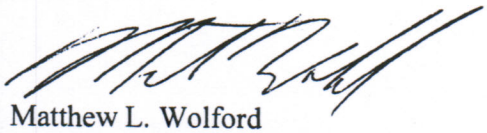
As your NOI Letter also discusses, recent studies by DEP and the U.S. Fish and Wildlife Service have raised new issues concerning WTC's discharge. Contrary to the suggestion of your Letter, however, WTC was not aware of the possible impacts discussed in these studies until 2013, when WTC obtained the two reports (late-April for the study conducted by the Service, and late-July for the study conducted by DEP). Since then, WTC has been in discussions with DEP about the implications of the studies and possible upgrades to WTC's facility. During these discussions, WTC has requested certainty in the effluent limitation standards to be achieved by way of a renewed NPDES permit, but DEP has not yet committed to certain standards for the permit. Obviously, from a business standpoint, it does not make sense for WTC to install additional treatment equipment to enable the Facility to meet a standard less stringent than will be required by the renewed NPDES permit. WTC is hopeful that DEP will soon be in a position to provide the needed certainty.

To summarize, the portrayal of WTC in your NOI Letter as environmentally irresponsible is false. The vast majority of the monthly effluent violations reported on WTC's Discharge Monitoring Reports resulted from DEP's decision to place WTC in the CWT Metals Subcategory, which is not the appropriate subcategory for the Facility. Had DEP placed the Facility in the Organics Subcategory as recommended by WTC's environmental consultant, the titanium and arsenic violations would not have occurred. Moreover, based on WTC's

discussions with DEP, DEP and EPA have since concluded that the Organics Subcategory is more appropriate for the Facility, so these violations will cease upon issuance of a renewed NPDES permit. With respect to the stream degradation reported in the above-referenced studies, WTC only recently learned about this issue and promptly began working with DEP to determine what measures should be implemented. Probably as a result of your NOI Letter, DEP commenced an enforcement action to address water quality issues at the Facility. Finally, the statements in your Letter that WTC is in violation of the Clean Water Act because the "expired" 2003 NPDES permit does not authorize WTC to process wastewater generated by the oil and gas industry are false. Comparable statements made by CWA's representative at its August 21 public meeting in Warren are likewise false. Moreover, inasmuch as a simple telephone call to the Water Management Permits Chief (David Balog, P.E.) of the DEP's Northwest Regional Office would have cleared up CWA's misunderstandings, it appears that CWA made these false statements knowingly or in reckless disregard of the truth. As such, CWA's statements are libelous and actionable, and WTC requests CWA to cease and desist from making such statements.

Please contact me at your earliest convenience to discuss this matter and CWA's role in the DEP's enforcement action. Thank you, and I look forward to hearing from you.

Sincerely,



Matthew L. Wolford

cc: Waste Treatment Corporation (via e-mail only)